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BRIEFS.

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No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, required suppression of communications that were intercepted within the territorial jurisdiction of the issuing court, pursuant to a wiretap order that permitted interceptions to take place outside the jurisdiction of the issuing court.

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OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Los Rovell Dahda* (Pet. App. 1a-31a), is reported at 853 F.3d 1101. The opinion of the court of appeals in *United States* v. *Roosevelt Rico Dahda* (Pet. App. 32a-58a) is reported at 852 F.3d 1282. The order of the district court (Pet. App. 59a-65a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 4, 2017. The petition for a writ of certiorari was filed on July 3, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner Los Dahda was convicted of conspiracy to possess with intent to

distribute and to distribute five kilograms or more of cocaine, to manufacture, to possess with intent to distribute, and to distribute 1000 kilograms or more of marijuana, and to maintain drug-involved premises, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), 846, and 856; two counts of distribution of marijuana in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), and 18 U.S.C. 2; maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1) and (2), and 18 U.S.C. 2; six counts of using a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b); three counts of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), and 18 U.S.C. 2; and two counts of attempted possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), 846, and 18 U.S.C. 2. D. Ct. Doc. 2076, at 1-2 (Oct. 5, 2015). He was sentenced to 189 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1a-31a.

Petitioner Roosevelt Dahda was convicted of conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine, to manufacture, to possess with intent to distribute, and to distribute 1000 kilograms or more of marijuana, and to maintain drug-involved premises, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 846; five counts of using a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b); two counts of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); possession with intent to distribute and distribution of marijuana within 1000 feet of a playground, in violation of 21 U.S.C.

841(a)(1) and (b)(1)(D), and 860; and attempted possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), and 846. D. Ct. Doc. 2192, at 1-2 (Nov. 13, 2015). He was sentenced to 201 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 32a-58a.

1. In 2006, Chad Bauman, Peter Park, and Wayne Swift began working together to distribute marijuana in Kansas. Pet. App. 3a. Park and Swift operated a business named California Connections, Inc. and used business locations in Kansas and Hayward, California to facilitate the shipment of marijuana to Kansas inside shipping crates. 15-3236 Gov't C.A. Br. 4. At first, they obtained their marijuana from Texas and Canada. Pet. App. 3a. Eventually, however, they changed sources and began obtaining their marijuana from California. *Ibid.* The organization sent money to California via Federal Express, hidden compartments in auxiliary fuel tanks of vehicles, and crates that were shipped to California. 15-3236 Gov't C.A. Br. 4.

Petitioner Los Dahda joined the network as an importer and a dealer. Pet. App. 3a. In those roles, Los Dahda helped to facilitate the transactions by driving money for buying the marijuana from Kansas to California; assisting with the purchase and packaging of marijuana in California; loading marijuana into crates for shipment to Kansas; and selling the marijuana in Kansas to redistributors. *Id.* at 3a-4a. His twin brother, petitioner Roosevelt Dahda, assisted Los Dahda by (*inter alia*) selling marijuana in Kansas, picking up shipments of marijuana from the warehouse in Kansas,

delivering marijuana to Park, collecting narcotics proceeds, and transporting cash to California. 15-3237 Gov't C.A. Br. 5.

The network operated for approximately seven years, but the relationships and work assignments varied over time. Pet. App. 4a. For example, when a dispute arose, Bauman stopped working with Park and Swift. *Ibid.* Nonetheless, petitioner Los Dahda continued to work with Bauman to acquire marijuana in California and to transport the marijuana to Kansas for distribution there. *Ibid.* Approximately one year later, Los Dahda stopped working with Bauman and resumed working with Park and Swift to acquire marijuana from California and in Kansas. *Ibid.*

2. As part of its investigation into the drug network, the government obtained wiretap-authorization orders under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, for telephones used by suspected members of the network. After petitioners were indicted on multiple drug-trafficking counts, they moved to suppress evidence obtained from the wiretaps on the ground that (*inter alia*) "the order of authorization * * * under which it was intercepted [wa]s insufficient on its face." 18 U.S.C. 2518(10)(a)(ii); see Pet. App. 14a. Petitioners contended (as relevant) that the wiretap orders failed to comply with 18 U.S.C. 2518(3), which permits courts to issue wiretap orders "approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting," *ibid.*; see Pet. App. 67a. Petitioners did not argue that the recorded communications were in fact intercepted outside of the territorial jurisdiction of the issuing court; there was "no

dispute that the government monitored the communications from a listening post in Kansas, i.e., within the jurisdiction of this issuing court." Pet. App. 68a. Rather, petitioners argued that the wiretap orders were facially overbroad because they provided that, "[p]ursuant to [18 U.S.C. 2518(3)], * * * in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any other jurisdiction within the United States." Pet. App. 15a-16a (citation omitted); see *id.* at 67a.

The district court referred petitioners' motion to a magistrate judge, who recommended denying it. Pet. App. 66a-76a. The magistrate explained that "[a] wiretap authorization order is presumed proper, and a defendant carries the burden of overcoming this presumption." *Id.* at 68a (citation omitted). The magistrate found that, by failing to cite any cases supporting their argument that the wiretap order was invalid, petitioners "ha[d] not carried [their] burden of overcoming th[at] presumption." *Id.* at 73a. As an additional, alternative basis for denying the motion, the magistrate determined that the complained-of language in the wiretap orders was "surplusage" and did not implicate any of "Congress's core concerns in passing Title III," and thus it did not require suppression. *Ibid.* The district court adopted the magistrate judge's report and recommendation. *Id.* at 65a.

After separate jury trials, petitioners Los Dahda and Roosevelt Dahda were convicted on 15 counts and 10 counts, and sentenced to 189 months of imprisonment and 201 months of imprisonment, respectively.

3. Petitioners each separately appealed, and the court of appeals affirmed in relevant part in both cases. Pet. App. 1a-58a. As relevant here, the court concluded

in Los Dahda's appeal that the wiretap orders were facially insufficient but that suppression of the intercepted communications was not required, *id.* at 15a-25a, and the court relied on that conclusion to reject Roosevelt Dahda's challenge to the wiretap evidence in his appeal, *id.* at 39a-40a.

As the court of appeals noted, it was undisputed that, "for each call used at trial, the agents' listening post was located in the District of Kansas," and therefore the "cell phone communications were intercepted in the issuing court's territorial jurisdiction, which fell within Title III's territorial limitations." Pet. App. 24a n.7. But the court concluded that the wiretap orders were "facially insufficient because they authorized use of a stationary listening post outside of the district court's territorial jurisdiction." *Id.* at 15a; see *id.* at 20a. The court reasoned that the orders "violated the general rule that interception must occur within the issuing court's territorial jurisdiction" "because there was no geographic restriction on the locations of either the cell phones or the listening posts." *Id.* at 17a. The court of appeals also deemed inapplicable the exception set forth in 18 U.S.C. 2518(3) that permits interception "outside [the court's] jurisdiction but within the United States in the case of a mobile interception device," *ibid.*, construing that exception to apply only where the device used to intercept communications is itself mobile. Pet. App. 17a-20a.

The court of appeals held, however, that the absence of a "geographic restriction," Pet. App. 17a, did not require suppression, see *id.* at 21a-25a. The court explained that, under this Court's precedent, "suppression is required only if the jurisdictional requirement is one of 'those statutory requirements that directly and

substantially implements the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *Id.* at 21a (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)) (brackets omitted).

"Applying this test," the court of appeals determined that "suppression is not required for the district court's authorization of wiretaps beyond the court's territorial jurisdiction." Pet. App. 21a. The court observed that "Congress's goals for Title III included * * * protection of the privacy of oral and wire communications and * * * establishment of a uniform basis for authorizing the interception of oral and wire communications." *Id.* at 22a. The court further observed that "the territorial limitation does not appear in the congressional examples of privacy protections in Title III," which focus on "[l]imiting who can conduct wiretaps" and "creating an evidentiary burden for a wiretap (probable cause)." *Ibid.* The court also reasoned that the territorial requirement does not "implicate the statutory goal of uniformity," and in fact it "potentially undermine[s] uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance." *Id.* at 23a. The court rejected petitioners' argument "that the territorial limitation thwarts forum shopping," explaining that, even with that limitation, the statute's design allows the government operational flexibility that affects the permissibility of a particular forum for seeking wiretap authorization. *Id.* at 23a-24a.

ARGUMENT

Petitioners contend (Pet. 17-22) that the district court erred in declining to suppress communications that were intercepted within the territorial jurisdiction

of the court that issued the wiretap orders because the orders contained overbroad language regarding the geographic scope of the interceptions they permitted. The court of appeals' decision rejecting petitioners' contention is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. This Court has made clear that "suppression is not mandated for every violation of Title III." *United States* v. *Chavez*, 416 U.S. 562, 575 (1974). "To the contrary, suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 433-434 (1977) (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)).

In *Chavez*, this Court held that suppression of wiretap evidence was not required when the application and order "did not correctly identify the individual authorizing the application, as 18 U.S.C. §§ 2518(1)(a) and (4)(d) require," because an appropriate official—the Attorney General—had in fact authorized the application. 416 U.S. at 570; see *id.* at 571-573. *Chavez* contrasted its holding with the Court's decision the same day in *Giordano*, which concluded that wiretap evidence had to be suppressed when the application was, "in fact, not authorized by one of the statutorily designated officials." 416 U.S. at 508; see *Chavez*, 416 U.S. at 571. Although Title III's requirement that wiretap applications be authorized only by certain officials "responsive to the political process" was a "critical precondition" to any judicial order, *Giordano*, 416 U.S. at 516, 520, Title III's requirements that the

authorizing official be *identified* in the wiretap application and order merely serve a "reporting function" and were not intended, "by themselves, to occupy a central, or even functional, role in guarding against unwarranted use" of wiretaps, *Chavez*, 416 U.S. at 578-579. Applying the same principle, the Court subsequently held in *Donovan* that a violation of two Title III requirements—that a wiretap application identify "all those likely to be overheard," and that the government inform the court "of all identifiable persons whose conversations were intercepted"—likewise did not warrant suppression. 429 U.S. at 435, 438; see *id.* at 434-439.

Assuming arguendo that the wiretap orders here were "facially insufficient under Title III," as the court of appeals held, Pet. App. 20a; but see pp. 21-22, *infra*, the Court's decisions in *Chavez*, *Giordano*, and *Donovan* support the court of appeals' holding that suppression was not warranted. The Court's reasoning in those cases indicates that incorrect language in a wiretap order does not warrant suppression of evidence that was nonetheless lawfully intercepted where the incorrect language does not implicate a Title III requirement that plays a "substantive role * * * in the regulatory system." *Chavez*, 416 U.S. at 578; see, *e.g.*, *United States* v. *Moore*, 41 F.3d 370, 374 (8th Cir. 1994) ("Every circuit to consider the question" as of 1994 "ha[d] held that [Section] 2518(10)(a)(ii) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect."), cert. denied, 514 U.S. 1121 (1995).

There is no dispute that all of the intercepted communications used at trial here were first heard at a listening post in Kansas, and thus were properly "intercepted" within the territorial jurisdiction of the issuing court. 18 U.S.C. 2518(3); see Pet. App. 24a n.7, 68a; see

also *United States* v. *Jackson*, 849 F.3d 540, 551 (3d Cir. 2017) ("We join the other courts of appeals that have addressed this issue in adopting the 'listening post' theory that under Title III either the interception of or the communications themselves must have been within the judge's territorial jurisdiction."). The critical question is therefore whether a wiretap order's incorrect language about its proper geographic scope violates a Title III requirement that "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures" to the circumstances that most warrant them. *Chavez*, 416 U.S. at 575, 578-579 (citation and internal quotation marks omitted). It does not.

The wiretap orders' inaccurate language regarding the geographic area in which interception could have occurred—where the communications sought to be suppressed were actually intercepted only within the court's territorial jurisdiction—is at most a "technical defect" that does not require suppression. *Moore*, 41 F.3d at 376. Although Title III generally limits the reach of a wiretap order to the issuing court's territorial jurisdiction, 18 U.S.C. 2518(3), that limitation does not play a "substantive role * * * in the regulatory system," *Chavez*, 416 U.S. at 578. As the court of appeals explained, confining the area in which interception may occur pursuant to an otherwise-valid wiretap order does not enhance the "protection of the privacy of oral and wire communications" or assist in the "establishment of a uniform basis for authorizing the interception of oral and wire communications." Pet. App. 22a (citing S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) (Senate Report)); see *id.* at 21a-22a. If anything, the court explained, "the territoriality limitations potentially undermine uniformity": to the extent they could require wiretap

orders to be obtained in multiple jurisdictions in the same investigation, those limitations may "requir[e] prosecutors in multiple jurisdictions" that may have different practices "to coordinate about how they use electronic surveillance." *Id.* at 23a (citing *Adams* v. *Lankford*, 788 F.2d 1493, 1499 (11th Cir. 1986)). Nor does Section 2518(3)'s territorial limitation directly protect privacy or substantively affect which communications may be intercepted. Moreover, the government may seek a wiretap order in a district in which it has a listening post (as it did here). *Id.* at 23a-24a.

In any event, regardless of whether Section 2518(3)'s territorial limitation on the district court's authority to authorize wiretaps directly and substantially implements core features of Title III, incorrect language in a wiretap order about its geographic scope does not do so. Title III does not require that a wiretap order explicitly set forth its territorial limitations. Section 2518(4) "enumerates certain categories of information that a wiretap order 'shall specify.'" *United States* v. *Scurry*, 821 F.3d 1, 8 (D.C. Cir. 2016). The location of the listening post is not part of the required information. In particular, Section 2518(4)(b)'s requirement of information about "the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted" requires only identification of the telephone (or the telephone number, or other specific facility or location) to be tapped, not the location where interceptions will occur, such as where law-enforcement agents will listen to the communications. *Id.* at 14 (citation and emphasis omitted). The requirement that applications and orders specify the "nature and location" of the "facilities" to be tapped, 18 U.S.C. 2518(4)(b), "reflects the constitutional command of particularization" enshrined

in the Fourth Amendment, Senate Report 101; see also *id.* at 102-103, which, "[i]n the wiretap context," is "satisfied by identification of the telephone line to be tapped and the particular conversations to be seized," *Donovan*, 429 U.S. at 427 n.15.

Given that Title III does not require a wiretap order to specify its territorial reach at all, the fact that an order contains incorrect language about its territorial scope does not implicate a core concern of the statute. Such language thus cannot justify suppression of communications that were in fact intercepted within the court's territorial jurisdiction.

2. a. Petitioners' counterarguments lack merit. Petitioners principally assert that the "core concerns" approach that this Court applied in *Chavez*, *Giordano*, and *Donovan* to claims that communications were "unlawfully intercepted" under 18 U.S.C. 2518(10)(a)(i) should not apply to petitioners' allegations that the wiretap orders were "insufficient on [their] face" under 18 U.S.C. 2518(10)(a)(ii). Pet. 18 (citation omitted); see Pet. 18-22. They argue (Pet. 13) that, unlike subparagraph (i), subparagraph (ii) establishes "a mechanical test"—*i.e.*, "either the warrant is facially insufficient or it is not"—and if it is facially insufficient, suppression is automatically required. That is incorrect.

Section 2518(10)(a) permits "[a]ny aggrieved person" to "move to suppress" intercepted communications on the grounds that the "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. 2518(10)(a). Contrary to petitioners' contention (Pet. 20), Section 2518(10)(a) does not automatically

require suppression whenever a court finds some defect, however technical or minor, in a wiretap order.

Taking account of Title III's purposes, this Court has held that subparagraph (i)'s "unlawfully intercepted" prong "was not intended to reach every failure to follow statutory procedures," but only violations of provisions that "directly and substantially implement" the statutory scheme. *Chavez*, 416 U.S. at 575 (citing *Giordano*, 416 U.S. at 527); see Senate Report 96 (Congress had "no intention * * * generally to press the scope of the suppression [rule] beyond present search and seizure law."). The same approach applies equally in construing subparagraph (ii)'s "insufficient on its face" prong. Even before *Giordano*, the Second Circuit denied suppression under Title III because an error in a wiretap order—"omission of a minimization directive"—"was a 'technical defect.'" *United States* v. *Cirillo*, 499 F.2d 872, 880 (2d Cir.), cert. denied, 419 U.S. 1056 (1974). Since then, every court of appeals that has directly addressed the issue has recognized that not every error in a wiretap order's language that might render it facially insufficient under subparagraph (ii) necessarily requires suppression. See Pet. 15-16 (citing *United States* v. *Cunningham*, 113 F.3d 289, 293-294 (1st Cir.), cert. denied, 522 U.S. 862 (1997); *United States* v. *Traitz*, 871 F.2d 368, 379 (3d Cir.), cert. denied, 493 U.S. 821 (1989); *United States* v. *Robertson*, 504 F.2d 289, 292 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975); *United States* v. *Vigi*, 515 F.2d 290, 293 (6th Cir.), cert. denied 423 U.S. 912 (1975); *United States* v. *Lawson*, 545 F.2d 557, 562 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *United States* v. *Lomeli*, 676 F.3d 734, 739 (8th Cir. 2012); *United States* v. *Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (per curiam); *United States* v. *Radcliff*,

331 F.3d 1153, 1162 (10th Cir.), cert. denied, 540 U.S. 973 (2003); *United States* v. *Nelson*, 837 F.2d 1519, 1527 (11th Cir.), cert. denied, 488 U.S. 829 (1988)); see also *Scurry*, 821 F.3d at 12 (noting that the D.C. Circuit has "left open the possibility" that a "technical defect" in a wiretap order might not require suppression (citing *United States* v. *Glover*, 736 F.3d 509, 515 (D.C. Cir. 2013))).

Petitioners contend (Pet. 19-20) that the reasons underlying the Court's interpretation of subparagraph (i) as not mandating suppression for every Title III violation do not apply to subparagraph (ii). In arriving at that interpretation, the Court relied in part on "the scheme of [Section 2518(10)(a)]," explaining that interpreting subparagraph (i) "to reach every failure to follow statutory procedures" would cause subparagraphs (ii) and (iii) to "be drained of meaning." *Chavez*, 416 U.S. at 575 (citing *Giordano*, 416 U.S. at 527). Petitioners argue (Pet. 19-20) that applying the same "core concerns" construction of subparagraph (i) to subparagraph (ii) is not necessary to avoid rendering other language surplusage, and that in fact it would create superfluity "because anything that gives rise to suppression under paragraph (ii) necessarily also does so under paragraph (i)." Petitioners are mistaken.

Interpreting subparagraph (ii), *in pari materia* with subparagraph (i), not to require suppression for every facial defect follows from "the scheme of the section." *Chavez*, 416 U.S. at 575. Given this Court's holdings that suppression is not automatic under subparagraph (i) even where communications are *actually* intercepted unlawfully, it is unlikely that Congress intended to make suppression mandatory under subparagraph (ii) whenever a wiretap order is deficient in any respect,

even though the interception is otherwise conducted lawfully. It would make little sense for Congress to require suppression invariably for insubstantial errors in authorizing documents that do not affect the conduct of surveillance while not doing so for errors that result in interception that in fact transgresses Title III.

Nor does interpreting both subparagraphs (i) and (ii) in parallel to limit suppression to violations of certain fundamental Title III requirements render subparagraph (i) redundant, as petitioners assert. Subparagraph (i) applies where communications were actually intercepted in violation of Title III's core requirements. By contrast, subparagraph (ii) applies where the wiretap order itself is deficient. Each provision might warrant suppression in circumstances where the other would not. If, for example, the wiretap application is not in fact authorized by an appropriate Executive Branch official, suppression is warranted under subparagraph (i) even if the wiretap order itself is facially sufficient for purposes of subparagraph (ii). See *Giordano*, 416 U.S. at 512-529. Conversely, if "the identity of the person * * * whose communications are to be intercepted" were "known," 18 U.S.C. 2518(4)(a), but not included in the wiretap order, a court might conclude that suppression is warranted under subparagraph (ii) even if the interception complied with the terms of the order and was not "unlawful[]" under subparagraph (i). In short, the fact that subparagraph (ii) may reach some violations that subparagraph (i) does not encompass does not require a finding "that suppression is required for every minor facial insufficiency." *United States* v. *Acon*, 513 F.2d 513, 517 (3d Cir. 1975).

b. Petitioners alternatively argue (Pet. 21) that, even if subparagraph (ii) requires suppression only for defects

that go to the "'core concerns' of the statute," Title III's territorial-jurisdiction limitation implicates those concerns. See Pet. 20-22. That argument misapprehends the type of defect at issue. It is undisputed that the territorial-jurisdiction limitation *itself* was not violated here. See Pet. App. 24a n.7, 68a. The relevant question, therefore, is whether the wiretap orders' *inaccurate language* regarding their territorial reach implicates core concerns. Petitioners do not identify any Title III requirement that a wiretap order specify its territorial limits. Nor do they explain how such a requirement would serve any core purpose of the statute.

In any event, petitioners fail to show that Title III's territorial-jurisdiction limitation itself "directly and substantially implements the congressional intention to limit the use of intercept procedures." *Chavez*, 416 U.S. at 575 (citation omitted). They do not dispute the court of appeals' conclusions that territorial limits do not protect privacy and do not establish a uniform basis for the interception of communications. Cf. Pet. App. 21a-23a. Petitioners instead fault the court of appeals (Pet. 21) for consulting legislative history to identify those as core Title III concerns. But the court of appeals properly followed the course charted by this Court's decisions, which have relied in part on the legislative record in construing Section 2518(10)(a) and ascertaining Title III's fundamental aims. See, *e.g.*, *Chavez*, 516 U.S. at 578-579; *Giordano*, 416 U.S. at 516-523, 526-529.

Petitioners assert (Pet. 22) that the territorial-jurisdiction restriction "limits forum shopping by prosecutors." But petitioners offer no evidence, from the legislative history or otherwise, that preventing forum shopping was among Congress's core concerns. And as the court of appeals explained, the territorial limitation in

some cases does not significantly restrict the government's choice of forum: the government may seek approval in whatever jurisdiction it chooses to establish its listening post, or, in narrow circumstances, it may seek approval in one jurisdiction for the use of a mobile interception device nationwide. Pet. App. 23a-24a. Petitioners discount these procedures, asserting (Pet. 22) that each will often be impractical. But even crediting their contentions, the fact that Title III permits these alternatives undermines petitioners' contention that the territorial-jurisdiction limitation implements a fundamental purpose of narrowing the government's flexibility with respect to a judicial forum. Nor does the general legal principle that "courts may act only within their jurisdictions," Pet. 21, justify the specific statutory remedy of suppressing probative wiretap evidence that was obtained in a manner that did not in fact exceed the authorizing court's jurisdiction.

3. Petitioners err in asserting (Pet. 11-17) that the decision below implicates a disagreement among the courts of appeals.

a. Petitioners argue (Pet. 15-16) that the decision below adds to existing disagreement about whether Section 2518(10)(a)(ii) requires suppression for every deficiency on the face of a wiretap order. That is incorrect. As discussed above, every circuit to address the issue has acknowledged that not every defect in a wiretap order that might render it facially insufficient necessarily requires suppression. See pp. 13-14, *supra*. Although the courts of appeals have used different language in describing the types of insufficiencies that do not warrant suppression, and some have reached different conclusions regarding certain specific defects, they are in general agreement that some defects do not require

suppressing communications that are otherwise lawfully intercepted. See, *e.g.*, *Traitz*, 871 F.2d at 379 (employing "[a] two tiered analysis," asking first if order is facially insufficient and second whether that insufficiency warrants suppression); *Moore*, 41 F.3d at 375 ("[W]e accept the district court's conclusion that the order is 'insufficient on its face' and turn to the second part of the *Traitz* two-tiered analysis, whether that defect requires suppression of the resulting wiretap evidence."); *Cunningham*, 113 F.3d at 294 (denying suppressing because "the flaw in this case, although serious, was a discrete set of clerical mistakes in a process that in all other important respects complied with the statute"); *Swann*, 526 F.2d at 149 (denying suppression for a "minor facial insufficiency"); *Vigi*, 515 F.2d at 293 (same); *Acon*, 513 F.2d at 517-519 (same); cf. *United States* v. *Joseph*, 519 F.2d 1068, 1070 (5th Cir. 1975) ("[T]his particular defect did not make an order facially insufficient."), cert. denied, 424 U.S. 909 (1976), and 430 U.S. 905 (1977).

Petitioners cite (Pet. 13-14) a single decision, the D.C. Circuit's ruling in *Glover*, *supra*, that they argue rejected the view that suppression is not required for every facially insufficient wiretap order. *Glover*, however, does not squarely conflict with this well-established consensus. As the D.C. Circuit subsequently explained in *Scurry*, its decision in *Glover* "left open the possibility" that a "technical defect" in a wiretap order might not require suppression. 821 F.3d at 12 (citing *Glover*, 736 F.3d at 515). Accordingly, the D.C. Circuit would not necessarily require suppression automatically for every deficiency on the face of a wiretap order.

b. Petitioners also assert (Pet. 16-17) that the decision below conflicts with the D.C. Circuit's specific holding in *Glover* addressing Title III's territorial-jurisdiction limitation. That is similarly incorrect.

The D.C. Circuit in *Glover* considered whether to suppress communications intercepted using a mobile interception device that was installed outside the issuing court's jurisdiction. The government had sought and obtained permission from a court in the District of Columbia to place a mobile interception device on the defendant's truck, even though the application in support of the wiretap order "made [] plain" that the defendant's truck was located in another jurisdiction (Maryland). 736 F.3d at 510. The D.C. Circuit held that evidence obtained from the wiretap had to be suppressed under Section 2518(10)(a)(ii) and Federal Rule of Criminal Procedure 41(b)(2). See 736 F.3d at 515. The court reserved judgment on whether a "technical defect" would necessitate suppression, holding instead that suppression was warranted based on what it described as a "blatant disregard of a district judge's jurisdictional limitation" that could not "be regarded as only 'technical.'" *Ibid.*

There is no conflict between the result in this case and the result in *Glover*. The D.C. Circuit had no occasion in *Glover* to decide whether suppression would be required based on the type of facial insufficiency the court of appeals found here—overbroad language in a wiretap order concerning the permissible location of interception that did not result in any violation of Title III's territorial limitation. Nor did it consider whether such surplus language would be a "technical defect," 736 F.3d at 515, that would not by itself require sup-

pression. Unlike in *Glover*, in which the wiretap application "made [] plain" that the government intended to execute the wiretap order outside the issuing court's jurisdiction, *id.* at 510, nothing in the wiretap applications in this case indicated that the government sought or intended to intercept calls outside of Kansas, the issuing court's jurisdiction. Moreover, whereas the government in *Glover* executed the wiretap order in another jurisdiction by installing a mobile interception device in that jurisdiction, in this case the government intercepted all communications at a listening post in Kansas. Pet. App. 24a n.7, 68a.

Petitioners suggest (Pet. 16-17) that *Glover* conflicts with the Eleventh Circuit's decision in *Adams* v. *Lankford*, *supra*, but that asserted conflict does not warrant review in this case. *Adams* upheld the denial of habeas corpus relief based on the contention that communications were unlawfully intercepted in one state-court judicial district pursuant to a wiretap order issued by a court in another district. See 788 F.2d at 1495-1500. The Eleventh Circuit concluded that the challenge was "not cognizable on federal habeas corpus review" because the statutory structure and legislative history of Title III showed that "Congress did not consider the violations" of the statute's territorial-jurisdiction limitation alleged "to be matters of core concern." *Id.* at 1499-1500. As petitioners note (Pet. 14), the D.C. Circuit stated in *Glover* that, if "an inquiry into the core concerns of the statute were permitted under" 18 U.S.C. 2518(10)(a)(ii), the court would conclude that "territorial jurisdiction *is* a core concern of Title III." 736 F.3d at 515 (citing *United States* v. *North*, 728 F.3d 429, 437 (5th Cir.), withdrawn and superseded on reh'g, 735 F.3d 212 (5th Cir. 2013) (per curiam)). Unlike both *Adams* and *Glover*, however, this case does not involve

communications intercepted outside the jurisdiction of the issuing court. Any disagreement between the Eleventh and D.C. Circuits about whether interception that occurs in violation of Title III's territorial-jurisdiction limitation implicates a core concern thus is not implicated here.

4. Even if the question presented otherwise warranted review, this case would be an unsuitable vehicle to resolve it for two reasons. First, the language that the court of appeals viewed as a defect did not in fact render the orders insufficient on their face. As the D.C. Circuit explained in *Scurry*, "[t]o determine whether a wiretap order is facially insufficient, a reviewing court must examine the four corners of the order and establish whether, on its face, it contains all that Title III requires it to contain." 821 F.3d at 8. In both *Chavez* and *Giordano*, this Court held that wiretap orders were not facially insufficient where the orders included the information that Title III required. See *Chavez*, 416 U.S. at 573-574; *Giordano*, 416 U.S. at 525 n.14; see also *Moore*, 41 F.3d at 375 (judge's failure to sign wiretap order did not require suppression because "[Section] 2518(4) does not mandate a signed order"); cf. *Scurry*, 821 F.3d at 12 (deeming wiretap orders "facially insufficient" because, unlike in "the technical-defect cases the [D.C. Circuit] cited in *Glover*," the orders in *Scurry* "failed to include * * * information expressly required by Title III").

As discussed above, nothing in Title III requires that a wiretap order include a geographic limitation of the kind the court of appeals found lacking. See pp. 11-12, *supra*. Section 2518(4), which "enumerates certain categories of information that a wiretap order 'shall specify,'" *Scurry*, 821 F.3d at 8, does not mandate an express

territorial limitation. And because no such information is required to begin with, a wiretap order that contains inaccurate (and ultimately unnecessary) language regarding its territorial scope is not facially insufficient. A wiretap order cannot be said to be "*insufficient* on its face," 18 U.S.C. 2518(10)(a)(ii) (emphasis added), if it contains all of the information that is necessary under the statute. That threshold ground for affirming the decision below would impede any consideration of the question presented.

Second, even if the wiretap evidence was admitted erroneously, any error was harmless and casts no doubt on the convictions. Rule 52(a) of the Federal Rules of Criminal Procedure directs that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993). As the government explained in the court of appeals, each petitioner's guilt was established by overwhelming non-wiretap evidence—including the testimony of cooperating witnesses, business records, and law-enforcement surveillance. See 15-3236 Gov't C.A. Br. 32-33; 15-3237 Gov't C.A. Br. 33-34. The court of appeals did not reach this additional basis for affirmance only because it rejected petitioners' Title III arguments on other grounds. Pet. App. 25a n.8; see *id.* at 40a (rejecting Roosevelt Dahda's argument based on court's holding in Los Dahda's appeal). A ruling in petitioners' favor that the wiretap evidence should have been excluded thus is unlikely to affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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